IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.613 OF 1990

Maharashtra State Electricity
Board, through its Executive
Engineer, Rural Division No.1,
Tarabai Park, Kolhapur ... Appellant

V/s.

1. Dhondiram Ramchandra Lohar
residing at Behind Mahadev Mandir
At & Post: Chinchwad, Tal.:Karvir
Dist.: Kolhapur

2. Khutubuddin Babasaheb Desai
residing at: near Vithoba Temple
Khavarao Galli, Pulachi Shiroli
Dist.:Kolhapur

3. U.A. Chopade
Asstt. Additional Engineer
Maharashtra State Electricity
Board, Tarabai Park, City
Division, Kolhapur ... Respondents

Miss.A.R.S. Baxi for Appellant
Mr.A.L. Desai for Respondents

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **SEPTEMBER 2, 2004**

JUDGMENT:-

. Although I had dictated the judgment on 15.7.2004 in Court, I found that certain judgments in respect of computing the compensation were not pointed out to me by either side. However, these judgments are relevant in the facts and circumstances of this case. Therefore, the judgment dated 15.7.2004 is recalled. I had called upon the parties to argue the appeal in light

of the judgments in *Mysore Sugar Company Ltd. v/s. B.T. Krishnamurthy,* **1997 (1) L.L.N. 947;** *Executive Engineer, Electrical Division, Balasore v/s. Commissioner for Workmen's Compensation,* **1992 II LLJ 807** and *Kerala Minerals and Metals Ltd. v/s. Raman Nair,* **1998 ACJ 868**.

2. This Appeal is directed against the order of the Commissioner for Workmen's Compensation allowing the application filed by the workman by directing the appellant to pay compensation of Rs.46865/- together with interest @ 6% per annum from the date of the accident till the date of the deposit.

2. The only question involved in the present appeal is whether the compensation has been calculated correctly. The appellant's claim is that the compensation is payable under section 4(1)(d) of the Act as the injury sustained by the workman resulted only in temporary disability. According to the Appellant, the respondent-workman is still working with them in the same capacity as he was when the accident occurred and, therefore, there is no loss of earning capacity. In these circumstances, it is submitted that the Commissioner for Workmen's Compensation ought to have calculated the compensation on the basis of section 4(1)(d) and not granted 100%.

3. Admittedly, the Respondent-workman met with an accident on 27.11.1986 arising out of and in the course of employment. The accident resulted in the respondent sustaining injuries and fracture to his right hand. He was hospitalised for some time and operated upon the right hand. It is in these circumstances that the workman claimed compensation from the appellant. He based his claim on his total wages being Rs.1390.90 per month and his age being 34 years. The workman had examined himself as well as the Doctor who treated him. The Doctor has stated in his deposition that the estimated disability percentage after examining the workman was 35% three months after the injury. The Doctor has deposed that the workman had restricted movements of the right shoulder.

4. Ms.Baxi, learned Advocate for the Appellant, submits that the workman is continuing in employment with the appellant despite the accident and, therefore, there is only a temporary partial disablement. She submits that a fracture cannot lead to permanent partial disablement requiring computation of compensation under section 4(1)(c)(ii) of the Workmen’s Compensation Act. She places reliance on the judgment of Orissa High Court in the case of *New India Assurance Co. Ltd. v/s.*

Surendra Kumar Sendha & Anr., **1986 ACJ 1083**. She further submits that the Doctor who was examined has only deposed as to the physical disability of the workman and this cannot amount to a loss of earning capacity.

5. There is evidence on record to show that the workman suffered a fracture on his right arm which required him to be hospitalised and operated upon. His right shoulder, according to the Doctor who was examined before the Commissioner has restricted movement on account of the accident. The disability has been estimated by him at 35%. The submission made on behalf of the appellant is that when the Doctor deposes regarding the physical disability it could not mean that there is a loss of earning capacity. The Doctor in the present case has estimated the disability percentage at 35%. He has also deposed that there is restricted movement of the shoulder. In these circumstances, it is difficult to accept the case made out by the Appellant on the basis of the judgment in the case of *New India Assurance Co. Ltd.* (supra) that there is no loss of earning capacity.

6. The submission of Ms.Baxi that since the respondent was working with the appellant, there was no loss of earning capacity cannot be accepted in view of

the judgement in *Executive Engineer, Electrical Division, Balasore* (supra) wherein the learned Single Judge of the Orissa High Court has considered whether a comparison between the wages drawn by the workman before and after the accident is a determinative factor while considering loss of earning capacity in the case of permanent partial disablement. It would be useful to reproduce the observations of the learned Single Judge, which are thus:

> 7. Coming to the question of entitlement of a claimant in case there is no loss of earning and there is continuance of engagement a reference to Section 4(1)(c)(ii) of the Act is necessary. The plea of employers that in case of continuance of engagement and non-reduction in earning, compensation is not payable, has not found favour with the Courts. As observed by the House of Lords in the case of *Ball v. William Hunt and Sons Ltd.* (1912 A.C. 496,) the Act regarded a workman only as a wage-earner and was concerned not with any physical pain or suffering or disfigurement to which a workman might be subjected by accident, but only with the loss of power to earn wages resulting from the injury. Lord Denning M.R. in *Fairley v. John Thomson:* (1973) 2 Lloyd's Rep. 40 observed as follows:-
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> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensations for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages."
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> This view has also been taken by the Court of Appeal, Civil Division, England in *Moeliker v. Reycolle and Co. Ltd.,* 1977 S.C.J. 364. *"Incapacity for work" is not the same thing as "incapacity to work". It means the loss or diminution of wage-earning capacity and it*

> *includes inability to work if that be the result of the accident. Similar view has been taken by Calcutta High Court in the case of Ram Naresh Singh v. Lodhna Colliery Co. (1920) Ltd.*, 1973 Lab.I.C. 1656, *Sarat Chatterjee & Co. (P) Ltd. v. Mohd Khalil:* 1979 A.C.J. 106, and the Rajasthan High Court in *Executive Engineer, P.W.D., Udaipur v. Narain Lal.,* (1978-I-LLJ-141). In considering loss of earning capacity in the case of a "permanent partial disablement", the comparison between the wages drawn by the workman before and after the accident, from his employer at the time of the accident, is not a determinative factor. If that be so, a cunning employer to tide over liability may offer a temporary employment to the claimant-workman to deprive the latter his entitlements under the Act. That would be against the legislative intent. This Court had also occasion to deal with an almost similar case where plea of existing job allotment and non-reduction in wages was involved. The employer-appellant was the employer in that case. A view similar to one taken by me was taken. See *Debaki Swain and another v. Executive Engineer Electrical Division, Bhawani-patna Orissa State Electricity Board,* 1988 A.C.J. 836. Therefore, the plea that there being no loss in the wages, compensation could not have been awarded is not acceptable.

7. Similarly, in the case of *Kerala Minerals and Metals Ltd.* (supra), the Division Bench of the Kerala High Court considered whether the employer can be exonerated of his liability under the Act of payment of compensation only because the workman continued in service and is earning the same emoluments. The Kerala High Court has considered the judgments of several High Courts and has held that the loss of earning capacity cannot be ruled by the mere fact that the workman continues to do the same work which he was doing before the accident and receives the same wages.

8. In the case of *Mysore Sugar Company Ltd.,* (supra), the Karnataka High Court has considered whether the employment given to an injured person would mean that the workman is able to do the same work that he was performing prior to the accident. The Karnataka High Court has held that although the Medical Officer had assessed permanent physical disability, the Commissioner has discretion to assess the loss of earning capacity with reference to the medical evidence.

9. The evidence recorded before the Commissioner indicates that the workman suffered from 35% disability. The Doctor has deposed that the workman had no further chance to improve the movements in his right shoulder. The Commissioner has rightly considered the fact that the Appellants had not challenged the extent of disability or the loss of earning capacity of the workman. Nor was the Doctor cross examined on this aspect.

10. In this view of the matter, the judgment of the Commissioner cannot be faulted. The Commissioner has found that there is loss of earning capacity, the Commissioner has indicated that the loss of earning capacity should be taken as 35%. I see no reason to differ from this finding. Appeal dismissed.

11. In view of the disposal of the First Appeal, Civil Application 3933 of 1990 does not survive and the same is disposed of accordingly.